

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex
rel. JONES & WERT
CONSTRUCTION SPECIALTIES,
INC.,

vs.

Plaintiff,

STRAUB CONSTRUCTION, INC.,

Defendant.

CASE NO. 10CV1415 JLS (RBB)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS**

(ECF No. 26)

Presently before the Court is Defendant Straub Construction, Inc.’s (“Defendant,” or “Straub”) Motion to Dismiss For Failure to State a Claim for Which Relief Can Be Granted. (ECF No. 26). Also before the Court is *qui tam* relator Jones & Wert Construction Specialties, Inc.’s (“Relator,” or “J&W”) response in opposition, (Resp. in Opp’n, ECF No. 30), and Straub’s reply in support, (Reply in Supp., ECF No. 32). The United States of America, which declined to intervene in this suit, has nonetheless filed a Statement of Interest Concerning Defendant’s Motion to Dismiss, (Statement of Interest, ECF No. 29), which is also before the Court.

The motion hearing set for February 28, 2013 was vacated and the matter taken under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having considered the parties’ arguments and the law, the Court

1 **GRANTS IN PART and DENIES IN PART** Straub's motion to dismiss and
 2 **DISMISSES WITHOUT PREJUDICE** J&W's complaint.

3 **BACKGROUND**

4 J&W brings this action against Straub under the False Claims Act, 31 U.S.C.
 5 § 3729 *et seq.*, based on Straub's conduct as a general contractor on two military
 6 construction projects—the Nellis Air Force Base Aircraft Maintenance project
 7 (“Nellis Project”) and the Fort Hunter Liggett Army Reserve Center project
 8 (“Hunter Liggett Project”). J&W contends that Straub concealed from the Army
 9 Corps of Engineers several unauthorized changes to building plans and falsely and
 10 misleadingly certified that its work was in accord with approved contract terms in
 11 order to receive payment.

12 J&W filed this action under seal on July 7, 2010 and the complaint was
 13 subsequently served on the United States Attorney General on September 23, 2010.
 14 This Court granted five requests for extension of time for the United States to decide
 15 whether or not to intervene in this litigation. On August 28, 2012, the United States
 16 filed notice of its election to decline intervention. The case was unsealed on the
 17 same day.

18 Significantly, J&W also filed a prior suit against Straub in this district
 19 pursuant to the Miller Act, 40 U.S.C. § 3131 *et seq.*, on October 8, 2009. J&W's
 20 Miller Act suit rested on similar allegations arising from Straub's work on the Nellis
 21 and Hunter Liggett projects. J&W and Straub resolved the initial suit and the parties
 22 filed a joint motion to dismiss on June 14, 2011. The motion was granted, and the
 23 case closed, on June 15, 2011.¹

24 **LEGAL STANDARD**

25 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion
 26 the defense that the complaint “fail[s] to state a claim upon which relief can be

27
 28 ¹ The Court **GRANTS** Straub's request for judicial notice of three documents
 from the prior suit, namely, the complaint, the joint motion to dismiss with prejudice,
 and the court's order dismissing the case with prejudice.

1 granted,” generally referred to as a motion to dismiss. The Court evaluates whether
 2 a complaint states a cognizable legal theory and sufficient facts in light of Federal
 3 Rule of Civil Procedure 8(a), which requires a “short and plain statement of the
 4 claim showing that the pleader is entitled to relief.” Although Rule 8 “does not
 5 require ‘detailed factual allegations,’ . . . it [does] demand[] more than an unadorned,
 6 the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662,
 7 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other
 8 words, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to
 9 relief’ requires more than labels and conclusions, and a formulaic recitation of the
 10 elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (citing
 11 *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). “Nor does a complaint suffice if it
 12 tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556
 13 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

14 “To survive a motion to dismiss, a complaint must contain sufficient factual
 15 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.*
 16 (quoting *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is
 17 facially plausible when the facts pled “allow[] the court to draw the reasonable
 18 inference that the defendant is liable for the misconduct alleged.” *Id.* (citing
 19 *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but
 20 there must be “more than a sheer possibility that a defendant has acted unlawfully.”
 21 *Id.* Facts “merely consistent with” a defendant’s liability fall short of a plausible
 22 entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court
 23 need not accept as true “legal conclusions” contained in the complaint. *Id.* This
 24 review requires context-specific analysis involving the Court’s “judicial experience
 25 and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-pleaded facts
 26 do not permit the court to infer more than the mere possibility of misconduct, the
 27 complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to
 28 relief.’” *Id.*

1 Moreover, “for a complaint to be dismissed because the allegations give rise
2 to an affirmative defense[,] the defense clearly must appear on the face of the
3 pleading.” *McCalден v. Ca. Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir. 1990).
4 The Court will grant leave to amend unless it determines that no modified contention
5 “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSoto v.*
6 *Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber*
7 *Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

ANALYSIS

9 Straub moves for dismissal on the ground that (1) J&W's *qui tam* claim is
10 barred by res judicata because a final judgment on the merits was reached in the
11 previous suit; and, (2) J&W fails to allege facts regarding Straub's purported fraud
12 with the particularity required by Rule 9(b). The Court addresses each argument in
13 turn.

14 | 1. Res Judicata

15 “‘The doctrine of res judicata provides that a final judgment on the merits bars
16 further claims by parties or their privies based on the same cause of action,’ and ‘is
17 central to the purpose for which civil courts have been established, the conclusive
18 resolution of disputes within their jurisdiction.’” *Headwaters Inc. v. U.S. Forest*
19 *Serv.*, 399 F.3d 1047, 1051–52 (9th Cir. 2005) (quoting *In re Schimmels*, 127 F.3d
20 875, 881 (9th Cir. 1997)). “The elements necessary to establish res judicata are: ‘(1)
21 an identity of claims, (2) a final judgment on the merits, and (3) privity between
22 parties.’” *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning*
23 *Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003)).

24 Due to the unique characteristics of *qui tam* litigation, however, the resolution
25 of a private suit never, or rarely, precludes a subsequent *qui tam* action. *See United*
26 *States ex. rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (“[T]he
27 outcome of a private employment suit never precludes a *qui tam* action (or a False
28 Claims Act suit directly by the United States).”); *United States ex. rel. Laird v.*

1 *Lockheed Martin Eng'g and Sci. Services Co.*, 336 F.3d 346, 357 (5th Cir. 2003),
 2 abrogated on other grounds by *Rockwell Int'l Corp. v. United States*, 549 U.S. 457,
 3 472 (2007). Persuasive authority indicates that this outcome follows from the
 4 “special status” of the United States in a *qui tam* action. *See Lusby*, 570 F.3d at 852.
 5 The United States is always a “real party in interest” in a *qui tam* suit, regardless of
 6 whether it chooses to intervene in the litigation. *Id.* (“It would be inappropriate to
 7 snuff out [the federal government’s interest] just because a potential relator
 8 thoughtlessly omitted a *qui tam* claim from a personal suit.”).

9 Moreover, *qui tam* litigation is governed by unique statutory requirements,
 10 which make it difficult, if not impossible, to combine a *qui tam* action with a
 11 personal action. *See id.*; *Laird*, 336 F.3d at 359–60. For example, the False Claims
 12 Act provides that a relator’s complaint must be filed *in camera* and remain under
 13 seal for at least 60 days to permit the Government to investigate a relator’s
 14 allegations and to make an informed decision as to whether to intervene in the suit.
 15 *See* 31 U.S.C. § 3730(b)(2). The False Claims Act also allows the Government to
 16 exercise ultimate control over the suit, regardless of whether it intervenes in the
 17 litigation. *See id.* at §§ 3730(b)(1), (c)(2)(A). These procedural differences suggest
 18 that a potential relator’s decision to split a personal claim and a *qui tam* claim
 19 “should be respected,” even if the two claims arise from the same nucleus of
 20 operative fact and constitute the same cause of action. *See Lusby*, 570 F.3d at 853.

21 Here, Straub contends that J&W’s prior action against Straub pursuant to the
 22 Miller Act precludes J&W from bringing this *qui tam* action. According to Straub,
 23 J&W’s Miller Act suit arose from the same nucleus of operative fact as its *qui tam*
 24 claim and ended in a final judgment on the merits after the parties filed a joint
 25 motion to dismiss with prejudice.

26 J&W’s Miller Act claim does not bar this action, however, because the United
 27 States is a real party in interest here. The Government’s interest should not be
 28 “snuffed out” based on J&W’s conduct in the previous suit, over which the

1 Government had no control. *See Lusby*, 570 F.3d 852. Furthermore, J&W could not
 2 have reasonably combined its *qui tam* claim with its Miller Act claim and its
 3 decision to split the two claims is defensible.²

4 Straub contends that the status of the United States as a real party in interest is
 5 irrelevant here because the United States has decided not to intervene in this
 6 litigation. According to Straub, a dismissal with prejudice on the basis of res
 7 judicata would only bar J&W from proceeding with this action and would not affect
 8 the United States, such that the Government could file a subsequent action against
 9 Straub under the False Claims Act if it wished to do so.

10 Straub's argument fails because the United States is ““bound by the judgment
 11 in all FCA actions, regardless of its participation in the case.”” *Lusby* 570 F.3d at
 12 853 (quoting *U.S. ex. rel. Eisenstein v. City of N.Y.*, 556 U.S. 928, 936 (2009)). A
 13 dismissal with prejudice as to J&W on the basis of res judicata would preclude
 14 subsequent suits by the Government or other potential relators. *See id.* Such an
 15 outcome would be improper in light of the Government's inability to participate in,
 16 or prevent the resolution of, J&W's original Miller Act suit. *See id.* Accordingly,
 17 the Court **DENIES** Straub's motion to dismiss the complaint on the basis of res
 18 judicata.³

19

20 ² Indeed, the United States took more than two years to complete its investigation
 21 in this case, far more than the 120-day limit set forth in Federal Rule of Civil Procedure
 4(m) for service of the summons and complaint. *See Lusby*, 570 F.3d at 852.

22 ³ This outcome appears to be consistent with the Ninth Circuit's analytical
 23 framework for evaluating a relator's *pre*-filing release of a False Claims Act claim. *See*
U.S. ex. rel. Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 233 (9th Cir. 1997);
U.S. ex. rel. Green v. Northrop Corp., 59 F.3d 953, 966 (9th Cir. 1995). This
 24 framework, which has been adopted by other circuits, *see e.g.*, *United States v. Purdue*
Pharma L.P., 600 F.3d 319, 329–33 (4th Cir. 2010), indicates that a *qui tam* action is
 25 barred by a pre-filing release only when the Government has been previously informed
 of, and has had an opportunity to investigate, the relator's allegations of fraud. Thus,
 26 when the Government initially learns about fraud allegations from a relator's complaint,
 27 a release is not enforceable.

28 A *post*-filing settlement and release resulting in a dismissal with prejudice in a
 concurrently litigated breach-of-contract suit arising out of the same facts and
 circumstances as the *qui tam* action implicates a different set of interests. Here, the
 outcome turns not on the Government's mere awareness of the fraud allegations, but

1 **2. Rule 9(b)**

2 Federal Rule of Civil Procedure 9(b) provides that “In alleging fraud . . . a
 3 party must state with particularity the circumstances constituting fraud” This
 4 heightened pleading standard for allegations of fraud applies to False Claims Act
 5 claims. *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001).

6 A complaint alleging violation of the False Claims Act must provide the
 7 “who, what, when, where, and how” of the fraud. *See Ebeid ex rel. United States v.*
 8 *Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). In particular, the complaint must
 9 provide detailed information regarding actual false claims submitted to the
 10 Government. It is not sufficient to allege that a contract or regulation has been
 11 violated without alleging an objectively false or fraudulent claim or its attendant
 12 circumstances. *See U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047,
 13 1057 (9th Cir. 2011).

14 Here, J&W maintains that Straub installed defective anchor rods and made
 15 various other unauthorized changes during work on the Nellis Project that “severely
 16 diminished” the “seismic, cosmetic, and structural integrity” of the project and fell
 17 substantially short of contract specifications. Similarly, with respect to the Hunter
 18 Liggett Project, J&W alleges that Straub installed concrete walls of improper
 19 dimension and, instead of reconstructing its walling system, chose to improvise the
 20 remainder of the building by utilizing substandard structural steel support and
 21 weakening rebar reinforcement.

22 J&W’s complaint also includes general allegations that Straub failed to inform
 23 the Army Corps of Engineers of these “material and structural deviations” from the

24 rather on the impropriety of binding the Government through the resolution of a private
 25 suit over which it had no control.

26 Indeed, the Government typically has the right to block a relator’s resolution of
 27 a *qui tam* action so long as the complaint remains under seal and the Government has
 28 yet to complete its investigation. *See United States ex rel. Killingsworth v. Northrop*
Corp., 25 F.3d 715, 723–24 (9th Cir. 1994) (interpreting 31 U.S.C. § 3730(b)(1)). It
 would appear to be inconsistent with this statutory right to give res judicata effect to a
 relator’s settlement and dismissal of a concurrently filed private suit negotiated without
 the Government’s knowledge or consent and before the unsealing of the case.

1 approved building plans and instead “present[ed] . . . claims to the United States to
 2 be paid while representing that the [projects] had been completed in accordance with
 3 plans and specifications.”

4 J&W’s fraud allegations are inadequate under Rule 9(b). Although J&W
 5 makes specific allegations regarding Straub’s failure to comply with contract terms,
 6 J&W offers no facts or details regarding Straub’s purported submission of false
 7 claims to the Government, the “*sine qua non*” of a False Claims Act claim. *U.S. ex*
 8 *rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002).
 9 J&W must plead with particularity “if or when any actual improper claims were
 10 submitted” to the Government, *see Cnty. of Santa Clara v. Astra U.S., Inc.*, 428 F.
 11 Supp. 2d 1029, 1037 (N.D. Cal. 2006), or at least allege the specific details of a
 12 fraudulent scheme together with some indicia of reliability supporting a conclusion
 13 that false claims were actually submitted to the Government, *see Ebeid* at 998–99. It
 14 is insufficient to plead regulatory or contract violations and simply assume that false
 15 claims were presented.

16 Moreover, J&W’s contention that it needs discovery to obtain information
 17 regarding the nature and timing of Straub’s false claims lacks merit. Plaintiffs
 18 alleging fraud must comply with Rule 9(b) upon the filing of the complaint and are
 19 not entitled to proceed to discovery to satisfy this basic pleading requirement. *See*
 20 *Clausen*, 290 F.3d at 1313 n.24.

21 Accordingly, the Court **GRANTS** Straub’s motion to dismiss for failure to
 22 meet the heightened pleading requirements of Rule 9(b). The Court **DISMISSES**
 23 **WITHOUT PREJUDICE** J&W’s complaint.

24 **CONCLUSION**

25 For the reasons stated above, the Court **GRANTS IN PART AND DENIES**
 26 **///**
 27 **///**
 28 **///**

1 **IN PART** Straub's motion to dismiss and **DISMISSES WITHOUT PREJUDICE**
2 J&W's complaint. J&W may file an amended complaint curing the noted
3 deficiencies within 14 days of the date that this Order is electronically docketed.

4 **IT IS SO ORDERED.**

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6 DATED: September 12, 2013

7 
8 Honorable Janis L. Sammartino
United States District Judge

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